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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of the Commission's
Rules to Establish New Personal
Communications Services

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General Docket No. 90-314

RM-7140; RM-7175; RM-7618

TO: The Commission

REPLY OF RAND MCNALLY
TO COMMENTS ON
PETITIONS FOR RECONSIDERATION AND CLARIFICATION

RAND MCNALLY & COMPANY
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Dated: January 13, 1994

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**REPLY OF RAND McNALLY
TO COMMENTS ON
PETITIONS FOR RECONSIDERATION AND CLARIFICATION**

Rand McNally & Company ("RMC") respectfully submits this reply to certain comments on petitions for reconsideration and clarification filed in the above proceeding on or before January 3, 1994. This reply is also being served upon the few parties of which we are aware that have filed comments or petitions relating to the specific issues discussed below. If requested, we would be pleased to serve additional parties as directed by the Commission.

I. Introduction

In their comments on petitions for reconsideration and clarification in this matter, certain parties have disputed RMC's copyright protection for the BTA/MTA listings that the Commission seeks to use as the basis for geographic boundaries for the new Personal Communications Services ("PCS"). Some comments have also discussed RMC's licensing proposal. We address these comments below.

Taken together, these comments validate our concerns about protecting our intellectual property rights. As we explain below, we are hopeful of reaching a resolution of this issue satisfactory to all concerned parties. Nevertheless, if the Commission cannot accept our proposal as set forth in our January 3, 1994 submission, or another mutually satisfactory

proposal that safeguards RMC's rights, we must again respectfully urge that the Commission select other geographic boundary definitions.

II. Rand McNally's BTAs and MTAs are Protected by Copyright

As we explained in our January 3, 1994 comments to the Commission, RMC's BTAs and MTAs -- as set forth in the Commercial Atlas & Marketing Guide and our Trading Area System MTA/BTA Diskette -- are protected by federal copyright law. The Supreme Court's decision in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991), does not suggest otherwise.

In Feist, the Court found that a "garden variety" white pages directory containing only the names, addresses and phone numbers of all subscribers in a particular area, arranged alphabetically, lacked sufficient originality to qualify for copyright protection. It made clear, however, that the requisite level of originality is quite low, and the vast majority of compilations would pass muster.

And indeed, since Feist was decided, numerous compilations have been held to be copyrightable and infringed by defendant's unauthorized use. See, e.g., Warren Publishing, Inc. v. Microdos Data Corp., Copyright L. Dec. (CCH) ¶ 26,928 (N.D. Ga. 1992) (plaintiff's Television and Cable Factbook copyrightable and infringed by defendant's copying of communities selected for inclusion); Nester's Map & Guide Corp. v. Hagstrom Map Co., 796

F. Supp 729 (E.D.N.Y. 1992) (New York taxi driver's guide copyrightable and infringed by defendant's copying of plaintiff's selection of cross streets and creative assignment of addresses to each cross street in the address locator section); Budish v. Gordon, 784 F. Supp. 1320 (N.D. Ohio 1992) (on motion for preliminary injunction, tables containing data relating to Medicaid eligibility contained in plaintiff's work "The Medicaid Trap" held copyrightable and infringed).

RMC's maps and BTA/MTA county listings are a far cry from the white pages listings denied protection in Feist, and clearly meet the originality standard. As we explained in our January 3, 1994 comments, the BTAs and MTAs are not dictated by external factors, but reflect the judgment and creativity of RMC compilers in selecting the criteria to be used in defining BTAs and MTAs, and in applying those criteria (which do not provide a simple formula, but require judgment and discretion in their application).

There is no basis for any claim that the BTAs and MTAs are merely "facts" or "ideas" that can be expressed in only one or very few ways. The underlying idea is to divide the United States into economic or commercial units. There are many ways to do this. The manner in which RMC has chosen to do so is copyrightable expression. The BTAs and MTAs do not actually exist -- except as an expression of RMC's analysis of commercial activity.

At least one party has argued that the BTA/MTA map constitutes but a small proportion of the Commercial Atlas & Marketing Guide. (Hill and Welch, Comments to Petitions for Reconsideration, Dec. 30, 1993, at p. 2.) However, copying even a small

proportion of copyrightable material from a protected work can infringe if the material is qualitatively significant, which the map certainly is. E.g., Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985) (unauthorized taking of 300 words from a 200,000 word manuscript held infringing); see Budish v. Gordon, supra (rejecting defendant's claim that the tables copied are a "de minimis" part of plaintiff's book, citing their significance to the work as a whole).

In any event, the BTA/MTA maps are independently copyrightable.* A refusal to concede the copyrightability of maps is completely inexplicable. (See Hill and Welch, Comments to Petitions for Reconsideration, Dec. 30, 1993 at p. 5, n. 9.) Maps have been copyrightable since the first Copyright Act back in 1790, which extended protection to just three categories of works: maps, charts and books. Feist did not remove protection from maps. See, e.g., Mason v. Montgomery Data, Inc., 967 F.2d 135 (5th Cir. 1992) (reversing district court's dismissal of plaintiffs' claims for infringement of their maps on the ground that maps aren't copyrightable).

Finally, one commentator has made the suggestion, which has been echoed by others, that because the Commission has made minor changes to the BTA/MTA listings for use as geographic boundaries in this proceeding, their publication and use by the parties, and by the

* Among the protectible aspects of the BTA/MTA map are the selection of BTAs and MTAs and the arrangement and coordination of counties in the United States into those BTAs and MTAs. An unauthorized reproduction of the listing of BTAs and MTAs would infringe those copyrightable elements of the map, even if RMC didn't separately publish them in database form.

Commission itself, somehow would not be infringing. (Telocator, Comments, Jan. 3, 1994 at pp. 9-10; see, e.g., Pacific Bell and Nevada Bell, Opposition and Comments to Petitions for Reconsideration, Jan. 3, 1994 at pp. 6-7.) That argument is simply wrong. Infringement does not require *identity* between two works, but *substantial similarity*. Substantial similarity between the BTA/MTA listings and the Commission's proposed geographic boundaries cannot be denied. Nor can infringement be avoided simply by calling the BTAs and MTAs by some other name. It is completely disingenuous to suggest that it would be unnecessary to obtain authorization from RMC to publish the listings.

III. Rand McNally Will Provide Flexible Licensing Schemes to Allow Access to and Use of the BTAs and MTAs in Connection With This Proceeding

In our January 3, 1994 comments we outlined a modified proposal concerning use of RMC's BTAs and MTAs. We continue to believe that our proposal meets the access needs of FCC auction participants and related parties to the BTAs and MTAs, while at the same time protecting RMC's copyright rights. Moreover, as we indicated there, we are aware of concerns raised by potential resellers and repackagers of data that would like to create derivative works from the BTA/MTA listings. Since many resellers stand to gain substantial revenues from reproducing and repackaging our copyrighted material, we believe appropriate compensation to RMC is warranted for the use of its intellectual property. At the same time, we reiterate our commitment to provide flexible licensing packages to resellers and repackagers with terms and conditions that depend on the extent (in scope and time) of the use sought.

IV. Rand McNally is Attempting to Work Out an Appropriate Licensing Scheme With Relevant Industry Representatives

RMC, in an effort to resolve this matter, has met with industry representatives involved in this proceeding in an attempt to explore the possibility of a blanket licensing arrangement. We are hopeful that such an arrangement can be accomplished, and the discussions are ongoing.

V. Without an Acceptable Licensing Arrangement, the BTAs and MTAs May Not Be Used

As we have stated in our earlier submissions, we are willing to work with the Commission and with other parties who have an interest in the impending auction proceedings in their efforts to establish appropriate geographic boundaries for the PCS. We believe the proposal we have put forth is a reasonable one. Moreover, as indicated above, we are also willing to explore other licensing approaches.

However, adequate protection for our intellectual property rights is essential to any regulatory scheme that the Commission adopts. We reiterate our concern that absent appropriate safeguards, it will be necessary to expend significant resources to defend and police our copyrights. Accordingly, if the Commission is unable to accept the terms of our proposal as set forth in our January 3, 1994 submission (or such licensing arrangement as may be mutually agreed upon by RMC, users of the BTA/MTA listings, and the Commission in

connection with this proceeding), we respectfully urge that it adopt alternative geographic boundary definitions for the PCS.

Please do not hesitate to contact us if you have any questions or comments concerning this reply or our earlier submissions to the Commission.

Respectfully submitted,

Rand McNally & Company

A handwritten signature in black ink, reading "Deborah Lipoff". The signature is written in a cursive, flowing style with a large, prominent "D" and "L".

Deborah Lipoff
Assistant General Counsel

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Dated: January 13, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of January 1994 sent a copy of the foregoing Reply of Rand McNally to Comments on Petitions for Reconsideration and Clarification to the following by first class United States mail, postage prepaid:

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